

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	
UNITED STATES OF AMERICA	)	
	)	CASE NO. 04CR10217GAO
v.	)	
	)	
DARREN F. WILDER	)	
_____	)	

**DEFENDANT'S PROPOSED JURY INSTRUCTIONS**

**Instruction No. 1**

**Preliminary Statement of Elements of Crime**

In order to help you follow the evidence, I will now give you a brief summary of the elements of the crimes charged, each of which the government must prove beyond a reasonable doubt to make its case:

First: \_\_\_\_\_  
Second: \_\_\_\_\_  
Third: \_\_\_\_\_

1<sup>st</sup> Cir. Pattern Jury Instruction 1.01

**Instruction No. 2**

**Possession of Child Pornography, 18 U.S.C. §2252A(a)(5)(B)**

The Defendant is accused of knowingly possessing child pornography that has been mailed; moved in interstate or foreign commerce. It is against federal law to possess child pornography that has been mailed; moved in interstate or foreign commerce. For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt;

First, that the defendant knowingly possessed computer images;

Second, that the computer images contained at least one image of child pornography;

Third, that the defendant knew that computer images contained an image of child pornography; and

Fourth, that the image of child pornography had been moved in interstate or foreign commerce.

It is the government's burden to prove beyond a reasonable doubt that all the elements listed previously and, in addition, that the defendant's possession does not fit with the rule I have just described.

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

"Possess" means to exercise authority, dominion or control over something. The law recognizes different kinds of possession.

"Possession" includes both actual and constructive possession. A person who has direct physical control of something on or around his or her person is then in actual possession of it. A person who is not in actual possession, but who has both the power and the intention to exercise control over something is in constructive possession of it. Whenever I use the term "possession" in these instructions, I mean actual as well as constructive possession.

"Possession" also includes both sole possession and joint possession. If one person alone has actual or constructive possession, possession is sole. If two or more persons share actual or constructive possession, possession is joint. Whenever I use the term "possession" in these instructions, I mean joint as well as sole possession.

"Child pornography" is any photograph; film; video; picture; computer image; computer-generated image; , where a person under age 18 engaging a sexually explicit conduct was used to produce the photograph; computer image; etc..

"Sexually explicit conduct" includes any *one* of the following five categories of conduct, whether actual or simulated; (1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of genital or pubic area of any person.

Whether an image of the genitals or pubic area constitutes a "lascivious exhibition" requires a

consideration of the overall content of the material. In considering the overall content of the image, you may, but are not required to, consider the following factors: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive, for example, a location generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the image appears intended or designed to elicit a sexual response from the viewer. An image need not involve all of these factors to constitute “lascivious exhibition.” It is for you to decide the weight, or lack of weight, to be given to the factors I just listed. This list of factors is not comprehensive and you may consider other factors specific to this case that you find relevant. An image has been “shipped or transported in interstate or foreign commerce” if it has been transmitted over the internet or over telephone lines.

Additionally, the Government must prove beyond a reasonable doubt that the children depicted in the images are real children and not morphed or graphic art.

1<sup>st</sup> Cir. Pattern Jury Instruction 1.02

United States v Hilton, 386 F. 3d 13 (1<sup>st</sup> Cir. 2004)

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)

**Instruction No. 2A**

**Definition of “Knowingly”**

The word “knowingly,” as that term as been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident. In the case before you the Government must prove beyond a reasonable doubt that the Defendant knew the images were on his hard drive. Similarly, the Government must prove beyond a reasonable doubt that the Defendant knew the images contained child pornography.

1<sup>st</sup> Cir. Pattern Jury Instruction 2.14

United States v. Lacy, 119 F. 3d 742, 748 (9<sup>th</sup> Cir. 1997)

United States v. Upham, 168 F., 532, 537 (1<sup>st</sup> Cir.1999) (question of whether defendant could be convicted of knowing possession of unlawful images that he believed to have been deleted and may not have known could be recovered, reserved for another day)

**Instruction No. 3**

**Mental State is Inconsistent with the Requisite Culpable State of Mind**

Evidence has been presented of the defendant's lack of knowledge of the content of his computer hard drive. Such lack of knowledge is inconsistent with the requisite knowing culpable state of mind. If after considering the evidence of knowledge or lack thereof, together with all the other evidence, you have a reasonable doubt that the defendant acted with knowledge, then you must find the defendant not guilty.

1<sup>st</sup> Cir. Pattern Jury Instruction 5.02

**Instruction No. 4**

**Duty of the Jury to Find Facts and Follow Law**

It is your duty to find the facts from all the evidence admitted in this case. To those facts you must apply the law as I give it to you. The determination of the law is my duty as the presiding judge in this court. It is your duty to apply the law exactly as I give it to you, whether you agree with it or not. You must decide the case solely on the evidence before you and according to the law. You will recall that you took an oath promising to do so at the beginning of the case.

In following, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions, or into anything I may have said or done, any suggestions by me as to what verdict you should return-that is a matter entirely for you to decide.

1<sup>st</sup> Cir. Pattern Jury Instruction 3.01

**Instruction No. 5**

**Presumption of Innocence; Proof Beyond a Reasonable Doubt**

As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proven beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions—one that a defendant is guilty as charged, the other that the defendant is not guilty—you will find the defendant not guilty.

It is not sufficient for the Government to establish probability, though as strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond a reasonable doubt. On the other hand, there are a few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return to a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

Approved by the 1<sup>st</sup> Circuit

United States v. Cleveland, 106 F. 3d 1056, 1062-60 (1<sup>st</sup> Cir. 1997), aff'd sub nom. Muscarello v. United States, 524 U.S. 125 (1998), recognized as abrogated on other grounds by Brache v. United States, 165 F. 3d 99 (1<sup>st</sup> Cir. 1999)



**Instruction No. 6**

**Defendant's Constitutional Right Not to Testify**

The defendant has the constitutional right not to testify and no inference of guilt, or anything else, may be drawn from the fact that the defendant did not testify. For any of you to draw such an inference would be wrong; indeed, it you be a violation of your oath as a juror.

1<sup>st</sup> Cir. Pattern Jury Instruction 3.03

**Instruction No. 7**

**What is Evidence; Inferences**

The evidence from which you are to decide what the facts are consists of sworn testimony from witnesses both on direct and cross-examination, regardless of who called the witness; the exhibits that have been received into evidence and any facts to which the lawyers have agreed stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition of fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You must accept the stipulation as fact to be given whatever weight you choose.

Although you may consider only the evidence presented in the case you are not limited in considering that evidence to the bald statements made by the witnesses or contained in the documents. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts that you find to have been proven such reasonable inferences as you believe are justified in the light of common sense and personal experience.

1<sup>st</sup> Cir. Pattern Jury Instruction 3.04

**Instruction No. 8**

**What is Not Evidence**

Certain things are not evidence. I will list them for you:

- (1) Arguments and statements by lawyers are not evidence the lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence but it is not evidence. If the facts as you remember them from the evidence differ from the way the lawyers have stated them, your memory of them controls.
- (2) Questions and objections by lawyers are not evidence. Lawyers have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by my ruling on it.
- (3) Anything that I have excluded from evidence or ordered stricken and instructed you to disregard is not evidence. You must not consider such items.
- (4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.
- (5) the indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have the indictment before you in the course of your deliberation in the jury room. That indictment was returned by a grand jury, which heard only the government's side of the case. I caution you, as I have before, that the fact that the defendant has had an indictment filed against him is no evidence whatsoever of his guilt. The indictment is simply an accusation. It is the means by which the allegations a charges of the government are brought before this court. The indictment proves nothing.

1<sup>st</sup> Cir. Pattern Jury Instruction 3.08

**Instruction No. 9**

**Cautionary and Limiting Instructions as to Particular Kinds of Evidence**

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I have told you when that occurred, and instructed you on the purposes for which the item can and cannot be used.

1<sup>st</sup> Cir. Pattern Jury Instruction 3.07

**Instruction No. 10**

**Weighing the Testimony of an Expert Witness**

You have heard testimony from persons described as experts. An expert witness has special knowledge or experience that allows the witness to give an opinion.

You may accept or reject such testimony. In weighing the testimony you should consider the factors that generally bear upon the credibility of a witness as well as the expert witness's education and experience, the soundness of the reasons given for the opinion and all other evidence in the case.

Remember that you alone decide how much of a witness's testimony to believe, and how much weight it should be given.

1<sup>st</sup> Cir. Pattern Jury Instruction 2.07

**Instruction No. 11**

**Statements by Defendant**

You have heard evidence that the defendant allegedly made statements in which the government claims he admitted certain facts. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give it. In making those decisions, you should consider all of the evidence about the statement, including the circumstances under which the statement may have been made and any facts or circumstances tending to corroborate or contradict the version of events described in the statement.

1<sup>st</sup> Cir. Pattern Jury Instruction 3.07

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "P.C. Horstmann".

Peter Charles Horstmann, Esquire  
BBO #556377  
PARTRIDGE, ANKNER & HORSTMANN, LLP  
200 Berkeley Street, 16<sup>th</sup> Floor  
Boston, Massachusetts 02116  
(617) 859-9999

**CERTIFICATE OF SERVICE**

I, Peter Charles Horstmann, Esquire, hereby certify that on this 6<sup>th</sup> day of March, 2006, a copy of the foregoing DEFENDANT'S PROPOSED JURY INSTRUCTIONS was served electronically upon Dana Gershengorn, Assistant United States Attorney, United States Attorneys Office, One Courthouse Way, Boston, MA 02210 and upon Sherri A. Stephan, US Department of Justice, Child Exploitation and Obscenity Section, 1400 New York Avenue NW, 6th Floor, Washington, DC 20005

A handwritten signature in blue ink, appearing to read "P.C. Horstmann".

Peter Charles Horstmann, Esquire